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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

DEJUAN JAVIER,

Defendant and Appellant.

2d Crim. No. B209766
(Super. Ct. No. F412643)
(San Luis Obispo County)

Dejuan Javier appeals the judgment following his conviction for four counts of second degree robbery. (Pen. Code, § 211.)¹ The jury found a true allegation that he committed the offenses for the benefit of, at the direction of, or in association with a criminal street gang. (§ 186.22, subd. (b)(1).) Javier was sentenced to prison for a term of 21 years four months. He contends the trial court erred in denying his motion to bifurcate trial of the gang enhancement, in admitting excessive gang evidence, and that there was prosecutorial misconduct regarding the gang evidence. He also claims error in failing to correct a mistake in his probation report. We will correct the probation report and affirm the judgment.

¹ All statutory references are to the Penal Code unless otherwise stated.

FACTS

At 10:40 a.m., a woman entered a San Luis Obispo branch of Downey Savings and Loan, remained for approximately 90 seconds, and left. Seconds later, Javier and another man entered the bank. Both wore masks and one wore a blue sweatshirt. They held an air pellet gun on three bank employees and obtained about \$1,800 from one of them. They demanded more money and took \$10,000 from the other two employees. The money was placed in a duffel bag. A customer in the bank was robbed of \$140 in cash. The robbers fled, driving away in a tan Toyota Camry.

Approximately three hours before the robbery, Leonard Jones, Javier and Ean Domino arrived at the home of Karl Jones in San Luis Obispo.² A woman driving a tan Toyota Camry arrived at Karl's home separately. She was the same woman who later entered the bank immediately before the robbery. Leonard, Javier and Domingo flashed hand signs associated with Los Angeles Gangster Crips criminal street gangs. Leonard stated that they intended to commit a robbery and asked Karl if he had a weapon. Karl had only an air pellet gun, and gave it to Leonard. Leonard gave Javier and Domingo masks and gave Javier a blue jacket. Leonard then left in his white car and Javier, Domingo and the woman left in the woman's tan Camry.

Twenty to thirty minutes later, Javier, Domingo and the woman returned to Karl Jones's house, and dumped a bag of money onto Karl's kitchen floor. The bag included another bag identified as belonging to "Downey Savings" which contained wrapped hundred dollar bills and coins. Leonard Jones arrived a few minutes later. Javier, Domingo, Leonard, and the woman divided the money. They stayed at Karl's house for approximately two hours, at one point sending Karl out for food, alcohol and cigars. Karl did not contact the police at that time. After the group left, Karl telephoned the police and informed an officer about the two visits.

Detective Richard Mendoza of the Los Angeles Police Department testified as a gang expert, and opined that the bank robbery was committed to promote, further

² At times, Leonard Jones and Karl Jones will be referred to by their first names for convenience.

and assist in criminal conduct by gang members and in association with a criminal street gang. He testified that Javier was a member of a Los Angeles gang known as the Eight-Trey Gangster Crips, and described the characteristics and criminal activities of that gang. Mendoza testified that gang members Maurice Shelmon and Christopher Perry had been convicted of robberies in 2006 and 2007, gang member Joe Nash had been convicted of attempted murder in 2006, gang member Isaiah Walker had been convicted of attempted murder in 2006, and gang member Wilson Jones had been arrested for murder in 2004.

Detective Mendoza also testified that Eight-Trey Gangster Crips engaged in witness intimidation. He gave two examples, an incident where a gang member killed a fellow member named "Huckabuck" for cooperating with the police in a criminal prosecution, and an incident where gang member Jasmine Jackson intimidated a witness during the preliminary hearing in the same case.

Detective Mendoza testified that Domingo was a member of the Five-Deuce Hoover Gangster Crips, and described robberies committed by members of that gang. Mendoza testified that 43-year-old Leonard Jones was a member of another Gangster Crips gang named the Original Valley Gangsters. Mendoza stated that, although Javier, Domingo and Leonard Jones were members of different gangs, all of the gangs were "Gangster Crips" gangs which were allies, not rivals. Mendoza opined that it was not unusual for an older member of the Original Valley Gangsters to work with younger gang members of the Eight-Trey and Five-Deuce Gangster Crips gangs, and that it was common for older gang members to plan robberies for younger gang members. Mendoza also testified that he was aware of bank robberies committed by the Eight-Trey Gangster Crips outside Los Angeles County, opining that less stringent security measures outside Los Angeles appealed to gang members.

DISCUSSION

No Abuse of Discretion in Denial of Motion to Bifurcate Gang Enhancement

Javier contends that the trial court abused its discretion by denying his motion to bifurcate trial of the criminal street gang enhancement and that the error

violated his right to a fair trial. He argues that the gang evidence was excessive and unnecessary to prove the charged offenses. We disagree.

The trial court possesses a broad discretion to bifurcate trial regarding a criminal street gang enhancement. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1050.) The trial court's discretion to deny bifurcation is broader than its discretion to admit gang evidence when the gang enhancement is not charged. (*Ibid.*) Gang evidence always carries a potential for prejudice and, in cases not involving gang enhancements, should not be admitted where its probative value is minimal. (*Id.* at p. 1049.) But often evidence of gang membership is relevant and admissible to prove issues relating to the charged offense, such as motive, modus operandi, identity or intent. (*Ibid.*) To the extent that evidence supporting a gang enhancement would be admissible at a trial of guilt, bifurcation is not necessary. (*Id.* at pp. 1049-1050.) A defendant must "... clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried." (*Id.* at p. 1051.) The trial court did not abuse its discretion in this case.

We agree with Javier that the crime of bank robbery is not inexorably tied to gang behavior, such as a criminal act against a rival gang (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1517), a battle over gang territory (*People v. Sandoval* (1992) 4 Cal.4th 155, 175), or retaliation or intimidation preceded by gang signs and identification (*People v. Villegas* (2001) 92 Cal.App.4th 1217, 1222). But, testimony by Detective Mendoza indicated that the commission of crimes by younger gang members to bolster their reputation within the gang is an important element of gang behavior and relevant to the motive for the bank robbery in this case. (See *People v. Zepeda* (2001) 87 Cal.App.4th 1183.) Evidence related to gang membership is not insulated from the general rule that all evidence relevant to a material issue in the case is admissible if it is not more prejudicial than probative, and is not cumulative. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167; *People v. Avitia* (2005) 127 Cal.App.4th 185, 192.)

Here, much of the gang evidence tended to prove both the underlying crimes and the enhancement. Evidence of gang membership and criminal practices was relevant to explain the motive for and method of the bank robbery. ""[B]ecause a motive

is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence." [Citations.]'" (*People v. Samaniego, supra*, 172 Cal.App.4th at p. 1168; *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1550.)

Javier asserts that the motive for bank robbery is money and no other evidence of motive is relevant. We do not dispute that people rob banks for money, but there is evidence of other elements to motive in this case. Portions of the evidence concerning gang cooperation and criminal enterprises explain why a group of Los Angeles residents would travel to San Luis Obispo to rob a bank. An explanation of this incongruity is probative to proving motive and *modus operandi*.

Gang evidence is also relevant to the issue of witness credibility. (See *People v. Ayala* (2000) 23 Cal.4th 225, 277; *People v. Samaniego, supra*, 172 Cal.App.4th at p. 1168.) Evidence of gang intimidation and retaliation against persons who cooperate with the police provided an explanation for any delay by Karl Jones in reporting the crime to the police, and was a response to defense attempts at impeachment. Also, the principal issue in the case was the identities of the robbers. At trial, Karl Jones identified Javier and others as well as the masks and pellet gun used in the robbery. Because the defense sought to impeach Karl Jones, the gang evidence was highly probative regarding the credibility of his testimony. (See *People v. Gonzalez* (2006) 38 Cal.4th 932, 944-947; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368-1369.)

Javier argues that the predicate offenses of attempted murder and the Huckabuck murder were more serious than the charged offenses, and that the predicate robberies were also more serious because they involved real guns. We conclude that none of this evidence was likely to have "sway[ed] the jury to convict regardless of the defendant's actual guilt." (*People v. Hernandez, supra*, 33 Cal.4th at p. 1049.)

Javier also argues that the trial court did not recognize its authority to bifurcate a gang enhancement under appropriate circumstances based on the comment that the court was "not aware of any situation" in which the gang enhancement would be bifurcated. We disagree because the court followed this remark with a reference to

Evidence Code section 352 and a statement that bifurcation would not be appropriate in this case.

No Prejudicial Error in Admission of Particular Gang Evidence

Javier contends that, even if his bifurcation motion was properly denied, the trial court erred by admitting excessive and prejudicial gang evidence and that he was denied a fair trial as a result. As Javier states, the "real issue in this case is whether the trial court permitted the prosecution to present a 'huge amount' of irrelevant or otherwise inadmissible evidence." Javier claims that much of the gang evidence was admitted to show his bad character, and was both irrelevant to the charged offenses and unnecessary to prove the enhancement.

We have already discussed the relevance of gang evidence in this case, but even relevant evidence should be excluded where its probative value is substantially outweighed by its potential for undue prejudice. (Evid. Code, § 352.) "Even if gang evidence is relevant, it may have a highly inflammatory impact on the jury." (*People v. Avitia, supra*, 127 Cal.App.4th at p. 192.) For Evidence Code section 352 purposes, "prejudicial" is not synonymous with "damaging," but refers instead to evidence that ""uniquely tends to evoke an emotional bias against defendant"" without regard to its relevance on material issues." (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.) We review the admission of gang testimony for abuse of discretion, and will uphold the trial court's ruling unless it results in a miscarriage of justice. (*Avitia, supra*, at p. 193.) Here, we conclude that the trial court did not abuse its discretion in not excluding any particular evidence or in not placing limits on the amount of gang testimony. Furthermore, if there was any error in admitting gang evidence, the error was harmless.

As Javier argues, the gang testimony was extensive. It comprised approximately 107 pages of the reporter's transcript, including 80 pages of direct testimony and 20 pages of cross-examination. Detective Mendoza testified to numerous crimes committed by two separate gangs and the crimes included attempted murder and murder. He also testified at length about the criminal behavior and other characteristics of the Eight-Trey Gangster Crips.

Javier argues generally that the testimony included details regarding other crimes that went beyond what was necessary to establish the elements of the offenses or gang enhancement. By inference, Javier is arguing that the sheer amount of details rendered the totality of the evidence excessive. The standard of review, however, is not whether the trial court admitted more evidence than was "necessary," but whether the court admitted irrelevant evidence or evidence whose prejudicial effect substantially exceeded its probative value.

Javier specifically challenges admission of evidence regarding the Huckabuck retaliation murder as more inflammatory than the charged offenses and, therefore, prejudicial. Murder is more serious than robbery, and evidence of murder is more inflammatory than evidence of robbery but, again, this factor alone does not render the admission of the evidence an abuse of discretion. Javier also claims that the suggestion of a direct connection between the Huckabuck incident and Karl Jones's credibility was prejudicial but this argument is connected to Javier's prosecutorial misconduct claim and will be discussed in connection with that issue. In addition, Javier claims that Mendoza's testimony regarding the Huckabuck and Jasmine Jackson incidents was inadmissible hearsay because he did not personally witness the incidents. That claim has been forfeited because Javier failed to make an objection in the trial court.

Even if there was error in the admission of the witness intimidation evidence and some other gang testimony, the error was harmless under any standard. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.) The evidence of Javier's guilt was overwhelming. Essentially undisputed evidence established Javier's guilt on the charged offenses. The gang evidence may have bolstered the credibility of Karl Jones but there was no significant challenge to his credibility that would have had any exculpatory effect. No competing witnesses or different versions of the facts of the bank robbery were presented by the defense.

Karl Jones testified that Javier and his accomplices came to his house, announced that they were going to rob a bank, obtained an air pellet gun, and distributed masks and a jacket or sweatshirt. Karl Jones also testified that the robbers discussed the

roles of Javier and Domingo and the woman in the robbery. Thereafter, Javier and his accomplices returned to Karl Jones's house and dumped the loot on his kitchen floor, including a bag of money with the bank's name on it. The robbers then drove off in a tan Toyota Camry belonging to the woman.

This testimony was corroborated by recovery of the pellet gun by the police, testimony by bank employees identifying the masks and blue jacket as similar to those distributed in the Jones house, the prior presence of a woman in the bank just looking around, and identification of the getaway car as a tan Toyota Camry. There was also testimony by a cell phone expert outlining the numerous cell phone communications at the relevant time between Leonard Jones and Javier. In fact, Javier does not challenge the evidence of the offenses or gang enhancement. He argues that they were over proven.

To some degree Javier's argument that the gang evidence was irrelevant to prove the charged offenses is based on the tacit recognition that the bank robbery was proven without the gang evidence. Also, the criminal activity of street gangs is common knowledge and it is unlikely that the jury was surprised by the general import of Detective Mendoza's testimony.³

No Prejudicial Prosecutorial Misconduct

Javier contends that the prosecutor committed misconduct during final argument by discussing the savagery of the Eight-Trey Gangster Crips and the crime where Huckabuck was killed for cooperating with the police. Javier argues that the prosecutor improperly appealed to the emotions of the jury and used the evidence to bolster the credibility of prosecution witnesses. We disagree.

Prosecutorial misconduct is reversible under the federal Constitution when it infects the trial with such unfairness as to make the conviction fundamentally unfair and a denial of due process. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1124.) "Conduct

³ Javier also contends that, if his failure to object to admission of much of the gang evidence forfeited the issue on appeal, the forfeiture was the result of ineffective assistance of counsel. We do not address that issue because we find no prejudicial error without regard to the forfeiture of any claim.

by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under [California] law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.'" (*Ibid.*) It is misconduct for the prosecutor to attempt to persuade the jury by referring in argument to facts not in evidence. (*People v. Hill* (1998) 17 Cal.4th 800, 827-828.) When the claim concerns comments made by the prosecutor before the jury, the standard is whether there is a reasonable likelihood that the jury construed or applied any of the comments in an objectionable fashion. (*People v. Cole* (2004) 33 Cal.4th 1158, 1202-1203.)

As respondent asserts, Javier waived this contention by failing to object in the trial court. (*People v. Morales* (2001) 25 Cal.4th 34, 43-44.) A claim of prosecutorial misconduct is forfeited on appeal unless the defendant objects on the ground raised on appeal, and requests that the jury be admonished to disregard the impropriety. (*People v. Hill, supra*, 17 Cal.4th at p. 820.) Here, no objection was made and there is no basis to conclude that an admonition would not have cured the harm. (*People v. Earp* (1999) 20 Cal.4th 826, 858.) We address the argument on its merits, however, because Javier claims that the failure to object was ineffective assistance of counsel. Javier argues that his counsel's failure to object constituted ineffective assistance. We conclude that, on the merits, there was no prejudicial error.

A prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence. (*People v. Hill, supra*, 17 Cal.4th at p. 819.) Javier argues that the prosecutor improperly used the Huckabuck killing to bolster Karl Jones's credibility even though Jones had no knowledge of that incident. Javier also argues that it was improper to use inflammatory evidence of the Huckabuck killing to frighten the jury. Although the prosecutor's argument in this regard was vigorous, it did not so infect the trial with unfairness as to make Javier's conviction a denial of due process. (See *People v. Zurinaga* (2007) 148 Cal.App.4th 1248, 1251.)

Cumulative Effect of Errors Not Prejudicial

Javier contends that the cumulative effect of errors requires reversal of the bank robbery conviction. A "series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*People v. Hill, supra*, 17 Cal.4th at p. 844.) As we have concluded that the trial court did not abuse its discretion regarding the admission of evidence, any possible error was harmless.

Correction of Error in Probation Report

Javier contends that the trial court erred by failing to correct an error in his probation report. The probation report incorrectly stated that bank employees identified Javier in a photographic lineup. At the sentencing hearing, Javier informed the court of the error and a second factual error in the probation report. The trial court corrected the other error and made a notation on the probation report regarding the other, but failed to complete the correction. Javier requests this court to correct the error. Respondent concedes the error but asserts the claim was waived because Javier "fail[ed] to object and make an offer of proof at the sentencing hearing." (*People v. Welch* (1993) 5 Cal.4th 228, 234.) The record clearly shows that defense counsel directed the trial court's attention to the error and to the evidence at trial that established the error. This action preserved the claim for appeal.

DISPOSITION

The last sentence of the third paragraph on page 4 of the probation report stating that "After being shown a photo lineup that included the defendant's picture, bank employees identified him as suspect 2, the man carrying the duffel bag, and not the

suspect who was armed" is deleted in its entirety. The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Dodie A. Harman, Judge
Superior Court County of San Luis Obispo

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